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**Testimony on House Bill 5456 – Asbestos Litigation Transparency  
Michigan Competitiveness Committee  
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My name is Charlie Owens and I am the State Director for the National Federation of Independent Business, an advocate for small businesses owners since 1943 with more than 10,000 members in Michigan.

We are here before the House Committee on Michigan Competitiveness to support legislation that would make much needed changes to the way that claims for injury due to asbestos exposure are litigated in our state. Specifically, this legislation will help bring transparency to asbestos litigation and ensure a fair process for all parties.

The major companies that were primarily responsible for asbestos exposure have filed for bankruptcy in federal courts, and are now immune from tort lawsuits. As part of the bankruptcy agreements they have set up trust funds with billions of dollars in assets to compensate claimants. These trusts have paid close to \$18 billion in claims to date and have approximately \$37 billion for future claims.<sup>1</sup>

The problem that exists currently in our state courts is that plaintiffs will pursue civil litigation in the state court, while concurrently seeking damages in federal court for relief from the asbestos trust funds as well. The filing of a claim with the trust fund means that the plaintiff is alleging that the company that created the trust is at least partly responsible for their client's condition. Without this information regarding the plaintiff's exposures to asbestos, and admissions that asbestos products from a trust fund company caused the plaintiff's disease, the court cannot properly apportion liability, if any, among the named defendants in the lawsuit. Currently, defendants in the litigation in Michigan courts are denied access to this information or must fight lengthy court battles to obtain access.

This is of particular concern to Michigan's small business owners. With nearly all the traditional asbestos defendants in bankruptcy, the plaintiffs' bar has turned its sights on "peripheral

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<sup>1</sup> Institute for Legal Reform research, *The impact of Ohio's asbestos trust transparency laws on tort litigation in the state*.

defendants” as litigation targets.<sup>2</sup> Sadly, the term peripheral defendants often includes many small business owners that had very little, if nothing, to do with the alleged exposure. In many cases, a small business that is alleged to have sold a consumer use product such as caulk or paint is included in an asbestos lawsuit even if the plaintiff’s claims are unsubstantiated and undocumented. Plaintiff’s attorneys know that the threat of costly litigation will cause many small business owners to settle even if they have no liability. As noted in a recent analysis of asbestos litigation tactics:

“Most of the companies named on a complaint likely did not contribute to the asbestos-related disease of the plaintiff. But they face a difficult choice: pay settlement dollars or prepare to prove their defense in what can be a bet-the-company trial.”<sup>3</sup>

That plaintiff’s attorneys are casting a wide net in these lawsuits is evidenced in the finding that nearly half of all lawsuits in 2015 named between 51 and 150 defendant companies, and the number of companies being named as defendants in all lawsuits averaged 69.<sup>3</sup>

That possibility – the fear of lawsuits by small business – is supported by an NFIB Research Foundation National Small Business Poll, which found that about half of small business owners surveyed either were “very concerned” or “somewhat concerned” about the possibility of being sued. The primary reasons small business owners fear lawsuits are: (1) their industry is vulnerable to suits; (2) they are often dragged into suits in which they have little or no responsibility; and (3) suits occur frequently.<sup>4</sup>

Experience has also shown that when the plaintiffs’ bar is required to disclose information that provides specific documentation of exposure, the number of lawsuits targeted at “peripheral defendants” declines precipitously. When the state of Georgia added new filing requirements for asbestos plaintiffs requiring specific documentation of exposure, one judge reported that his caseload dropped from 1,200 to only a dozen in one year.<sup>5</sup>

Doug Volpi, an NFIB member who owns a paint store in Southern California, provides a vivid example of this litigation abuse. He received a summons in the mail notifying him that his business, Frontier Paint, was a defendant in a multi-million dollar asbestos lawsuit. Mind you, the allegations in the complaint stated that the plaintiff had been exposed to asbestos in the 1960s and 1970s from use of a product called “Fixall.” The manufacturer of Fixall has long since gone bankrupt leaving small businesses who allegedly sold the product holding the bag. Mr. Volpi bought his Southern California business in 1997 – over twenty years after the plaintiff’s alleged exposure. Moreover, the plaintiff lived in San Francisco nowhere near the location of Mr. Volpi’s Southern California store.

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<sup>2</sup> Theodore Voorhees, Jr., Eric Hellerman, Covington & Burling *Peripheral Defendants as Litigation Targets*

<sup>3</sup> KCIC, *Asbestos Litigation 2015 Year in Review*

<sup>4</sup> NFIB National Small Business Poll, “Liability,” William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 2 (2002).

<sup>5</sup> Tim Povtak, Walter Pacheco, *Asbestos Laws in Georgia*

Upon receipt of the summons – Mr. Volpi first panicked, then he went to work. According to Mr. Volpi as soon as he read the papers he said to his wife “we’re going to need to hire a lawyer.” And they did. Then Mr. Volpi himself spent hours on-line researching the plaintiff’s claims and discovered that the plaintiff’s attorney’s firm had a known reputation trolling for defendants. In Mr. Volpi’s words this attorney “dropped a net, dragged it around, and pulled it up to see if there was any halibut.” Thanks to the work of Mr. Volpi’s attorney – Frontier Paint didn’t become halibut. But dismissal of Mr. Volpi’s business came at a significant cost to Frontier Paint. Mr. Volpi and his wife paid what was to them significant fees just to get their business removed from a complaint in which it should never have been named in the first place.

Mr. Volpi’s story, unfortunately, is not unique. Class action cases are rife with stories like Frontier Paint’s. In these cases, plaintiffs’ attorneys use a shotgun approach - hundreds of defendants are named in a lawsuit, and it is the defendants’ responsibility to prove that they are not culpable. In many cases, plaintiffs name defendants by using vendor lists or even lists from the Yellow Pages of certain types of businesses (e.g., auto supply stores, drugstores) operating in a particular jurisdiction.

Another NFIB member has been targeted in asbestos litigation. The family-owned commercial construction business, which was founded over 40 years ago, has been named in over 10 asbestos lawsuits. According to the member, his company has been targeted in recent years as many asbestos manufacturers have gone bankrupt leaving a void of solvent defendants. As a result, attorneys are now trolling for construction firms that existed in the 1960s, that are still in existence, and preferably with deep pockets, today.

The NFIB member, who wishes to remain anonymous for fear publicity surrounding his company’s involvement in asbestos litigation will cause more attorneys to target the business, has never been sued by an employee – all suits have been filed by individuals who allege that the NFIB member company was one of potentially dozens of subcontractors on a particular job site where the plaintiff worked and was allegedly exposed to an asbestos product. In several instances, it was later shown the plaintiff could never have worked at a site alongside the NFIB member, such as when exposure allegedly occurred at a marine construction site or before the company even existed. Still, to get dismissed from these cases the NFIB member spends thousands of dollars in attorney’s fees and discovery costs.<sup>6</sup>

While this legislation does not address all the problems referenced in these examples, it will bring transparency to asbestos litigation and allow for this kind of information that may have already been disclosed to be available to defendants and make it less costly for a fair defense of the alleged claim.

Let me conclude by again emphasizing our support for House Bill 5456 and we thank you for your support of Michigan’s small business owners.

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<sup>6</sup> March 13, 2013, NFIB Testimony before the Congress, House of Representatives Committee on the Judiciary, Subcommittee on the Constitution on the subject of “Litigation Abuses”

